APPEAL NO. 022956
FILED JANUARY 10, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 6, 2002. The hearing officer determined that the appellant/cross-respondent's (claimant) last injurious exposure to the hazards of the occupational disease was on March 3, 2000; that the employer for purposes of the 1989 Act is (employer); that the claimant sustained a repetitive trauma injury affecting her neck, elbows and wrists/hands; that the date of the injury is _____; that the claimant did not timely report the injury to her employer or have good cause for failing to do so; that the claimant did not timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission); and that because of the claimant's failure to timely give notice and file a claim for compensation, the repetitive trauma injury is not compensable and the claimant did not have disability. The claimant appeals the determinations relating to the date of injury, timely notice and timely filing of a claim, as well as the resulting effects of those determinations on compensability and disability. Respondents/cross-appellants 2, 3, and 4 (Carriers 2, 3, and 4 respectively) conditionally appeal the findings that the claimant sustained a repetitive trauma injury (albeit one that was determined to be not compensable) and that, due to the injury, the claimant was unable to obtain or retain employment at her preinjury wage from January 24, 2001, through the date of the hearing. Respondent 1 (Carrier 1) and Carriers 2, 3, and 4 respond to the claimant's appeal.

DECISION

Affirmed as modified.

ISSUES APPEALED BY THE CLAIMANT

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that was not submitted into the record at the hearing and is raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the documents that the claimant attached to her request for review and, consequently, we decline to give them consideration.

The hearing officer did not err in determining that the claimant's date of injury is _____. The date of injury, the date that the claimant knew or should have

known that her neck, elbow, and wrists/hands conditions may have been related to her employment was a factual question for the hearing officer to resolve. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947). Nothing in our review of the record indicates that the date-of-injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the claimant's assertion on appeal that the hearing officer erred in determining that the claimant notified her employer of a work-related injury on February 8, 2001, we note that the claimant stipulated to this fact at the hearing and is consequently bound by this date. Additionally, the evidence supports the February 8, 2001, determination date. The determination that the claimant did not file a claim for compensation with the Commission within one year of the date of injury is similarly supported by the evidence. Because we perceive no error in the aforementioned determinations made by the hearing officer, we conclude that there was no error in the conclusions that the claimant did not sustain a compensable repetitive trauma injury or have disability.

The claimant asserts on appeal that the hearing officer erred in not allowing the claimant to add a waiver issue, which was not raised at the benefit review conference (BRC). The claimant, relying on Continental Casualty Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), requested that the hearing officer consider whether Carriers 1 and 2 waived their right to contest compensability of the claimed injury by failing to meet the seven-day deadline to begin paying benefits or to give written notice of its refusal to pay benefits of claimant's claimed injury, pursuant to Section 409.021(a). The hearing officer denied the request to add the additional issue. Section 410.151(b) provides, in part, that an issue not raised at a BRC may not be considered unless the parties consent or, if the issue was not raised, the Commission determines that good cause exists for not requesting the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) provides that additional issues may be added by a party responding to the BRC report no later than 20 days after receiving it, by unanimous consent in writing no later than 10 days before the hearing, and on the request of a party if the hearing officer finds good cause. The hearing officer determined that the claimant did not establish good cause for adding the requested issue. The hearing record does not contain a copy of the written request made by the claimant, although we note that a copy was submitted with the claimant's appeal. Under these facts, we perceive no abuse of discretion on the part of the hearing officer denying the motion to add the additional issue. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

The claimant complains on appeal that Carriers 1 and 2 refused to produce certain subpoenaed documents that would have resulted in a different decision had they

been produced. The claimant did not, however, raise this issue at the hearing and has, therefore, waived the argument on appeal. We note that even had the claimant raised this matter at the hearing, the hearing officer has no authority to compel compliance. In a case where a deponent fails to comply with the Commission's subpoena, Rule 142.1 states that enforcement of subpoenas shall be governed by TEX. GOV'T CODE ANN. § 2001.201 (Vernon Pamph. 1999).

The claimant complains that in the Statement of the Evidence, the hearing officer incorrectly states that the claimant was employed by the employer from September 20, 1990, through March 3, 2000. While this statement is indeed inaccurate, the hearing officer's findings of fact correctly reflect the employment dates as stipulated by the claimant. The claimant also points out on appeal that the hearing officer's decision reflects that Carrier 1 offered nine exhibits, all of which were admitted at the hearing. Although apparently nine exhibits were initially intended to be offered, only three were actually offered and admitted. The hearing officer's decision is reformed to reflect that Carrier 1 offered three exhibits, numbers 1, 5, and 7, which were admitted into the record.

With regard to the claimant's argument that the hearing officer did not thoroughly review the record, as evidenced by the fact that she issued a decision prior to receiving a transcript of the proceedings, we note that the hearing officer had no obligation to review the testimony, via a transcript, when she presided over the hearing. We note that the hearing officer's decision clearly and succinctly summarizes the facts in this case and we find no evidence to support the claimant's contention that the hearing officer did not thoroughly review the evidence in the case.

ISSUES APPEALED BY CARRIERS 2, 3, AND 4

Whether the claimant's work activities were sufficiently repetitive to cause her conditions and whether the injury rendered the claimant unable to obtain or retain employment at her preinjury wage were also factual determinations for the hearing officer to resolve. Nothing in our review of the record indicates that the hearing officer's findings with regard to these issues are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. That notwithstanding, because we affirmed the hearing officer's determinations relating to the date of the injury, timely notice and timely filing of a claim, we also affirm the conclusions that the claimant did not sustain a compensable repetitive trauma injury and did not have disability.

The hearing officer's decision and order is affirmed as modified.

The true corporate name of insurance carrier 1 is **SAFECO INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

LEON CROCKETT
1600 NORTH COLLINS BOULEVARD, SUITE 300
RICHARDSON, TEXAS 75080.

The true corporate name of insurance carrier 2 is **EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

RICK KNIGHT
105 DECKER COURT, SUITE 600
IRVING, TEXAS 75062.

The true corporate name of insurance carrier 3 is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

DONALD GENE SOUTHWELL
10000 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75625.

The true corporate name of insurance carrier 4 is **LUMBERMEN'S MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Terri Kay Oliver
Appeals Judge

_____
Edward Vilano
Appeals Judge